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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**

8  
9 WILLIAM WHITSETT, )  
10 Petitioner, ) 3:10-cv-00100-LRH-WGC  
11 vs. ) **ORDER**  
12 STEFANIE HUMPHREY, *et al.*, )  
13 Respondents. )  
14 \_\_\_\_\_ /

15 This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254,  
16 by a Nevada state prisoner. This matter comes before the Court on the merits of the petition.

17 **I. Procedural History**

18 On May 12, 2006, an indictment was filed in the Eighth Judicial District Court for the State  
19 of Nevada, in Case No. C222265, charging petitioner with five counts of burglary, one count of  
20 attempted robbery, two counts of larceny from a person, victim age 60 or older, and one count of  
21 robbery, victim age 60 or older. (Exhibit 1).<sup>1</sup> On June 29, 2006, a guilty plea agreement was filed in  
22 open court which indicated that petitioner would be withdrawing his prior plea of not guilty in Case  
23 No. 222265 and would be entering a plea of guilty to one count of robbery of a victim 60 years of  
24 age or older. Pursuant to the guilty plea agreement, petitioner would be adjudicated guilty of robbery

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1 The exhibits referenced in this order are found in the Court's record at ECF No. 9.

1 of a victim age 60 or older in Case No. C222265, and would agree to plead guilty to one count of  
2 robbery of a victim age 60 or older and burglary in Case No. C219262. As a condition of the plea,  
3 the State would have no opposition to concurrent time between the two counts in Case No. C219262,  
4 but the State would retain the right to argue for consecutive time between the charges in Case No.  
5 C219262 and the charge in Case No. C222265. (Exhibit 2, at p. 1). An amended indictment was  
6 filed on June 29, 2006, reflecting this action. (Exhibit 3).

7 On August 18, 2006, a judgment of conviction was filed in Case No. 222265, pursuant to a  
8 guilty plea, convicting petitioner of one count of robbery of a victim 60 years of age or older.  
9 (Exhibit 4). Petitioner was sentenced to 36 to 120 months imprisonment, plus an equal and  
10 consecutive term of 36 to 120 months imprisonment for the age-of-victim enhancement. (*Id.*).

11 On May 29, 2007, petitioner filed a post-conviction habeas petition in state district court.  
12 (Exhibit 5). On September 18, 2007, the state district filed an order denying the state habeas  
13 petition. (Exhibit 6). Petitioner appealed. (Exhibit 7). On April 7, 2008, the Nevada Supreme  
14 Court entered an order affirming in part, reversing in part, and remanding. (Exhibit 8). The Nevada  
15 Supreme Court's order remanded the case to the state district court "for a limited evidentiary hearing  
16 on the issue of whether appellant's counsel refused to file an appeal after being asked by appellant to  
17 do so." (Exhibit 8, at p. 7).

18 On August 8, 2008, an evidentiary hearing was held in the state district court on the issue of  
19 whether petitioner had directed his counsel to file an appeal on his behalf. (Exhibit 9). On August  
20 26, 2008, the state district court issued findings of fact, conclusions of law, and order. (Exhibit 10).  
21 The state district court found that it was petitioner's attorney's practice to make a note in the file if a  
22 defendant asks to appeal, and that there was no such note in petitioner's file, indicating that no  
23 request to appeal was received. (Exhibit 10, at p. 4). Petitioner appealed this ruling. (Exhibit 11).  
24 On January 7, 2010, the Nevada Supreme Court affirmed the state district court's ruling. (Exhibit  
25 12).

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1 Petitioner dispatched his federal habeas petition to this Court on February 17, 2010. (ECF  
 2 No. 4, at p. 1). The petition contains three grounds. (*Id.*). Respondents previously moved to dismiss  
 3 Ground 3 of the petition as unexhausted. (ECF No. 8). By order filed January 26, 2011, the Court  
 4 granted the motion. (ECF No. 12). Petitioner filed a motion to dismiss Ground 3 of the petition and  
 5 proceed on Grounds 1 and 2, which the Court granted on June 22, 2011. (ECF No. 15).  
 6 Respondents filed an answer to Grounds 1 and 2 of the petition on February 27, 2012. (ECF No. 19).  
 7 Petitioner did not file a reply, despite being given an opportunity to do so.

8 **II. Federal Habeas Corpus Standards**

9 The Antiterrorism and Effective Death Penalty Act (“AEDPA”), at 28 U.S.C. § 2254(d),  
 10 provides the legal standard for the Court’s consideration of this habeas petition:

11 An application for a writ of habeas corpus on behalf of a person in  
 12 custody pursuant to the judgment of a State court shall not be granted  
 13 with respect to any claim that was adjudicated on the merits in State  
 14 court proceedings unless the adjudication of the claim –

15 (1) resulted in a decision that was contrary to, or involved an  
 16 unreasonable application of, clearly established Federal law, as  
 17 determined by the Supreme Court of the United States; or

18 (2) resulted in a decision that was based on an unreasonable  
 19 determination of the facts in light of the evidence presented in the State  
 20 court proceeding.

21 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications  
 22 in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect  
 23 to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state court  
 24 decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C.  
 25 § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the Supreme  
 26 Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from  
 a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme  
 Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529  
 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). The formidable

1 standard set forth in section 2254(d) reflects the view that habeas corpus is ““a guard against extreme  
 2 malfunctions in the state criminal justice systems,’ not a substitute for ordinary error correction  
 3 through appeal.” *Harrington v. Richter*, 562 U.S. \_\_\_, \_\_\_, 131 S.Ct. 770, 786 (2011) (quoting  
 4 *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)).

5 A state court decision is an unreasonable application of clearly established Supreme Court  
 6 precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct  
 7 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that  
 8 principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*,  
 9 529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more  
 10 than merely incorrect or erroneous; the state court’s application of clearly established federal law  
 11 must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409). In determining whether a  
 12 state court decision is contrary to, or an unreasonable application of federal law, this Court looks to  
 13 the state courts’ last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991);  
 14 *Shackelford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9<sup>th</sup> Cir. 2000), cert. denied, 534 U.S. 944 (2001).

15 In a federal habeas proceeding, “a determination of a factual issue made by a State court shall  
 16 be presumed to be correct,” and the petitioner “shall have the burden of rebutting the presumption of  
 17 correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). If a claim has been  
 18 adjudicated on the merits by a state court, a federal habeas petitioner must overcome the burden set  
 19 in § 2254(d) and (e) on the record that was before the state court. *Cullen v. Pinholster*, 131 S.Ct.  
 20 1388, 1400 (2011).

21 **III. Discussion**

22 **A. Ground 1**

23 Petitioner contends that his counsel was ineffective for failing to file an appeal from the  
 24 judgment of conviction, despite petitioner’s request to do so. Petitioner states that he would have  
 25 appealed the length of his sentence as depriving him of “a chance at life again.” (ECF No. 4, at p. 3).

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## 1. Ineffective Assistance of Counsel Standard

2 Ineffective assistance of counsel claims are governed by the two-part test announced in  
3 *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a  
4 petitioner claiming ineffective assistance of counsel has the burden of demonstrating that (1)  
5 counsel's performance was unreasonably deficient, and (2) that the deficient performance prejudiced  
6 the defense. *Williams v. Taylor*, 529 U.S. 362, 390-391 (2000) (citing *Strickland*, 466 U.S. at 687).  
7 To establish ineffectiveness, the defendant must show that counsel's representation fell below an  
8 objective standard of reasonableness. *Id.* To establish prejudice, the defendant must show that there  
9 is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding  
10 would have been different. *Id.* A reasonable probability is "probability sufficient to undermine  
11 confidence in the outcome." *Id.* Additionally, any review of the attorney's performance must be  
12 "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct, in  
13 order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner's  
14 burden to overcome the presumption that counsel's actions might be considered sound trial strategy.

15 *Ia.*

16       Ineffective assistance of counsel under *Strickland* requires a showing of deficient

17 performance of counsel resulting in prejudice, “with performance being measured against an

18 ‘objective standard of reasonableness,’ . . . ‘under prevailing professional norms.’” *Rompilla v.*

19 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an

20 ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary

21 to, or an unreasonable application of, the *Strickland* standard. *See Yarborough v. Gentry*, 540 U.S.

22 1, 5 (2003). There is a strong presumption that counsel’s conduct falls within the wide range of

23 reasonable professional assistance. *Id.*

24 The United States Supreme Court has described federal review of a state supreme court's  
25 decision on a claim of ineffective assistance of counsel as "doubly deferential." *Cullen v. Pinholster*,  
26 131 S.Ct. 1388, 1403 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 112-113, 129 S.Ct.

1 1411, 1413 (2009)). In *Cullen v. Pinholster*, the Supreme Court emphasized that: “We take a ‘highly  
 2 deferential’ look at counsel’s performance . . . through the ‘deferential lens of § 2254(d).’” *Id.* at  
 3 1403 (internal citations omitted). Moreover, federal habeas review of an ineffective assistance of  
 4 counsel claim is limited to the record before the state court that adjudicated the claim on the merits.  
 5 *Cullen v. Pinholster*, 131 S.Ct. at 1398-1401. The United States Supreme Court has specifically  
 6 reaffirmed the extensive deference owed to a state court’s decision regarding claims of ineffective  
 7 assistance of counsel:

8 Establishing that a state court’s application of *Strickland* was  
 9 unreasonable under § 2254(d) is all the more difficult. The standards  
 10 created by *Strickland* and § 2254(d) are both “highly deferential,” *id.* at  
 11 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117  
 12 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in  
 13 tandem, review is “doubly” so, *Knowles*, 556 U.S. at \_\_\_, 129 S.Ct. at  
 14 1420. The *Strickland* standard is a general one, so the range of  
 reasonable applications is substantial. 556 U.S. at \_\_\_, 129 S.Ct. at  
 1420. Federal habeas courts must guard against the danger of equating  
 15 unreasonableness under *Strickland* with unreasonableness under §  
 16 2254(d). When § 2254(d) applies, the question is whether there is any  
 17 reasonable argument that counsel satisfied *Strickland*’s deferential  
 18 standard.

19 *Harrington v. Richter*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 770, 788 (2011). “A court considering a claim of  
 20 ineffective assistance of counsel must apply a ‘strong presumption’ that counsel’s representation was  
 21 within the ‘wide range’ of reasonable professional assistance.” *Id.* at 787 (quoting *Strickland*, 466  
 22 U.S. at 689). “The question is whether an attorney’s representation amounted to incompetence  
 23 under prevailing professional norms, not whether it deviated from best practices or most common  
 24 custom.” *Id.* (internal quotations and citations omitted).

25 The *Strickland* standard also applies to claims of ineffective appellate counsel. *Smith v.*  
 26 *Robbins*, 528 U.S. 259, 285 (2000). Appellate counsel has no constitutional duty to raise every non-  
 frivolous issue requested by the client. *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983). To state a  
 21 claim of ineffective assistance of appellate counsel, a petitioner must demonstrate: (1) that counsel’s  
 22 performance was deficient in that it fell below an objective standard of reasonableness, and (2) that  
 23 the resulting prejudice was such that the omitted issue would have a reasonable probability of

1 success on appeal. *Id.* “Experienced advocates since time beyond memory have emphasized the  
2 importance of winnowing out weaker arguments on appeal and focusing on one central issue if  
3 possible, or at most on a few key issues. *Id.* at 751-52. Petitioner must show that his counsel  
4 unreasonably failed to discover and file nonfrivolous issues. *Delgado v. Lewis*, 223 F.3d 976, 980  
5 (9<sup>th</sup> Cir. 2000). It is inappropriate to focus on what could have been done rather than focusing on the  
6 reasonableness of what counsel did. *Williams v. Woodford*, 384 F.3d 567, 616 (9<sup>th</sup> Cir. 2004)  
7 (citation omitted).

## 2. Application of *Strickland* to Ground 1

9 The Court notes that when initially addressing this claim, Nevada Supreme Court, by order  
10 filed April 7, 2008, remanded the case to the state district court “for a limited evidentiary hearing on  
11 the issue of whether appellant’s counsel refused to file an appeal after being asked by appellant to do  
12 so.” (Exhibit 8, at p. 7). On August 8, 2008, an evidentiary hearing was held in the state district  
13 court on the issue of whether petitioner had directed his counsel to file an appeal on his behalf.  
14 (Exhibit 9). On August 26, 2008, the state district court issued findings of fact, conclusions of law,  
15 and order denying the habeas petition. (Exhibit 10). The state district court found that it was  
16 petitioner’s attorney’s practice to make a note in the file if a defendant asks to appeal, and that there  
17 was no such note in petitioner’s file, indicating that no request to appeal was received. (Exhibit 10,  
18 at p. 4). Petitioner appealed this ruling. (Exhibit 11). On January 7, 2010, the Nevada Supreme  
19 Court affirmed the state district court’s ruling. (Exhibit 12). On appeal, the Nevada Supreme Court  
20 rejected petitioner’s claim, as follows:

21 Appellant claimed that trial counsel was ineffective for failing to file  
an appeal after being requested to do so.

22 The district court found trial counsel's testimony – that he went  
23 through the plea agreement with appellant and explained appellant's  
24 limited right to appeal, that he did not know of any non-frivolous  
25 issues that would have [been] successful on direct appeal, and that  
26 appellant never requested an appeal – to be credible. We conclude that  
the district court's findings were based upon substantial evidence and  
were not clearly wrong. See Means v. State, 120 Nev. 1001, 1012, 103  
P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272,

1 278 (1994) (district court's factual findings regarding a claim of  
 2 ineffective assistance of counsel are entitled to deference when  
 3 reviewed on appeal). Based on these findings, we conclude that the  
 4 district court did not err in denying this claim. See Hathaway v. State,  
 5 119 Nev. 248, 254, 71 P.3d 503, 507 (2003); Thomas v. State, 115  
 6 Nev. 148, 151, 979 P.2d 222, 224-25 (1999); Davis v. State, 115 Nev.  
 7 17, 20, 974 P.2d 658, 660 (1999); see also Roe v. Flores-Ortega, 528  
 8 U.S. 470 (2000).

9 (Exhibit 12, at pp. 1-2). The factual findings of the state court are presumed correct. 28 U.S.C. §  
 10 2254(e)(1). Conclusory allegations will not overcome the presumption that the state court's findings  
 11 are correct. *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9<sup>th</sup> Cir. 2000). In this case, the Nevada courts  
 12 found that credible evidence indicated that petitioner had not requested an appeal. Counsel has a  
 13 duty to file a direct appeal only where one is requested or where there are non-frivolous grounds for  
 14 appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). The state court found that petitioner failed  
 15 to request that his attorney file a direct appeal and his counsel knew of no non-frivolous issues that  
 16 would have succeeded on direct appeal. Petitioner has failed to demonstrate that his counsel's  
 17 performance was deficient within the meaning of *Strickland* and its progeny.

18 Moreover, even assuming that petitioner could overcome the presumption of factual  
 19 correctness and prove that his counsel's performance was deficient, he cannot show prejudice.  
 20 Petitioner wished to appeal the length of his sentence and this would not have entitled him to relief.  
 21 The Nevada Supreme Court will not overturn a sentence on appeal “[s]o long as the record does not  
 22 demonstrate prejudice resulting from consideration of information or accusations founded on facts  
 23 supported only by impalpable or highly suspect evidence.” *Silks v. State*, 92 Nev. 91, 94, 545 P.2d  
 24 1159, 1161 (2009). The Nevada Supreme Court has held that regardless of its severity, a sentence  
 25 that is within the statutory limits is not ““cruel and unusual punishment unless the statute fixing the  
 26 punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as  
 to shock the conscience.”” *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 489 (2009) (quoting  
*Blume v. State*, 112 Nev. 472, 475 (1996)).

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1       The United States Supreme Court held that the Eighth Amendment contains a “narrow  
 2 proportionality principle.” *Graham v. Florida*, 560 U.S. 48, 59-60 (2010) (internal quotation marks  
 3 omitted). This principle “does not require strict proportionality between the crime and the sentence  
 4 but rather forbids only extreme sentences that are grossly disproportionate to the crime.” *Id.* (internal  
 5 quotations omitted). Still, it is exceptionally difficult for a defendant to show that his sentence is  
 6 unconstitutionally disproportionate in violation of the Eighth Amendment. Several United States  
 7 Supreme Court cases dictate upholding a defendant’s sentence, even where the sentence seems harsh  
 8 in light of the offense committed. *See, e.g., Ewing v. California*, 538 U.S. 11 (2003) (upholding 25-  
 9 year sentence of habitual criminal defendant for stealing three golf clubs, holding that the states may  
 10 dictate how they wish to deal with recidivism issues); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (50-  
 11 years-to-life sentence for stealing \$150 of videotapes upheld under California’s three-strikes law);  
 12 *Hutto v. Davis*, 454 U.S. 370 (1982) (40-year prison sentence upheld where defendant was convicted  
 13 of possession with intent to sell nine ounces of marijuana); *Rummel v. Estelle*, 445 U.S. 263 (1980)  
 14 (life sentence upheld where defendant was repeat offender and committed third felony of stealing  
 15 \$120). Petitioner’s sentence of 36 to 120 months, plus an equal and consecutive term of 36 to 120  
 16 months imprisonment, is within statutory guidelines and is not “grossly disproportionate” to the  
 17 crime committed, robbery of a victim 60 years of age or older. (*See Exhibit 4*). Because petitioner  
 18 would have had no reasonable probability of success on appeal had he asserted the argument that his  
 19 sentence was too lengthy, petitioner fails to show prejudice. *See Jones v. Barnes*, 463 U.S. 745, 751-  
 20 54 (1983).

21       The other ground on which petitioner alleges that he wanted to appeal was the “failure to  
 22 receive the benefit of the bargain,” referring to his guilty plea. This claim would have no reasonable  
 23 probability of success on appeal. In the guilty plea memorandum, petitioner pled guilty to robbery of  
 24 a victim 60 years of age or older. The State agreed not to oppose concurrent sentences. (Exhibit 2,  
 25 at p. 1). The guilty plea memorandum was clear that the issue of whether the counts would run  
 26 concurrently or consecutively was within the discretion of the sentencing judge. (Exhibit 2, at p. 2).

1 Regarding the benefit of the bargain, petitioner received the benefit of having seven other felony  
2 counts dismissed. (Exhibit 1). Again, petitioner would have had no reasonable probability of  
3 success on appeal had he asserted that he did not receive the benefit of the bargain. Petitioner fails to  
4 show prejudice. *See Jones*, 436 U.S. at 751-54.

5 In sum, the Nevada Supreme Court held that petitioner did not request a direct appeal,  
6 negating any argument that counsel's performance was not reasonable. And, as discussed above, the  
7 issues that petitioner claims he would have made on direct appeal would have had no reasonable  
8 probability of success, and as such, petitioner suffered no prejudice. The Nevada Supreme Court  
9 reasonably applied the appropriate federal standard to petitioner's ineffective assistance of counsel  
10 claims. Petitioner has failed to demonstrate that his counsel's performance was deficient or that he  
11 was prejudiced under *Strickland*. Petitioner has failed to meet his burden of proving that the Nevada  
12 Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly  
13 established federal law, as determined by the United States Supreme Court, or that the ruling was  
14 based on an unreasonable determination of the facts in light of the evidence presented in the state  
15 court proceeding. This Court denies federal habeas relief as to Ground 1 of the petition.

16 **B. Ground 2**

17 **1. Ground 2, Sub-Part 1**

18 Petitioner alleges that his counsel was ineffective for failing to initiate competency  
19 proceedings. (ECF No. 4, at p. 5). The Nevada Supreme Court rejected this argument, as follows:

20 Our review of the record reveals that appellant failed to demonstrate  
21 that he was incompetent to enter his guilty plea. This court has held  
22 that the test for determining competency is whether the defendant has  
23 sufficient present ability to consult with his lawyer with a reasonable  
24 degree of rational understanding – and whether he has a rational as  
25 well as factual understanding of the proceedings against him.  
Appellant must demonstrate incompetence by a preponderance of the  
evidence. Here, appellant failed to state what facts contained in his  
presentence report raised doubts about his competency. Thus,  
appellant's petition contained only bare and naked claims for relief that  
were unsupported by any specific factual allegations. Therefore, the  
district court did not err in denying appellant's claim.

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\* \* \*

Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. As noted above, appellant failed to demonstrate that he was incompetent to enter his guilty plea. Thus, appellant failed to demonstrate that his counsel was ineffective for failing to raise the issue of competence. Therefore, the district court did not err in denying appellant's claim.

6 (Exhibit 8, at pp. 2-4) (footnotes omitted). The factual findings of the state court are presumed  
7 correct. 28 U.S.C. § 2254(e)(1). Conclusory allegations will not overcome the presumption that the  
8 state court's findings are correct. *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9<sup>th</sup> Cir. 2000). Petitioner  
9 has failed to demonstrate that his counsel's performance was deficient or that he was prejudiced  
10 under *Strickland*. Petitioner has failed to meet his burden of proving that the Nevada Supreme  
11 Court's ruling was contrary to, or involved an unreasonable application of, clearly established federal  
12 law, as determined by the United States Supreme Court, or that the ruling was based on an  
13 unreasonable determination of the facts in light of the evidence presented in the state court  
14 proceeding. Federal habeas relief is denied as to Ground 2, sub-part 1 of the petition.

## 2. Ground 2, Sub-Part 2

16 Petitioner claims that he is factually innocent of robbing victim Richard Davis and that his  
17 counsel was ineffective in failing to present this defense. (ECF No. 4, at p. 5). The Nevada Supreme  
18 Court rejected this claim, as follows:

19 [A]ppellant claimed that his counsel was ineffective for failing to raise  
20 a defense of actual innocence in regard to victim Richard Davies.  
21 Specifically, appellant claimed that the grand jury testimony  
22 demonstrated that he did not rob Davies. Appellant failed to  
23 demonstrate that his trial counsel was deficient or that he was  
24 prejudiced. Importantly, during the plea canvass appellant  
25 acknowledged that he had read, signed and understood the written plea  
26 agreement and that he had discussed all possible defenses with his  
counsel. In his guilty plea agreement, appellant pleaded guilty to one  
count of robbery of a victim over the age of 60 and admitted that he  
had committed this crime against the following victims: Richard  
Davies, and/or Josefino Amigable, and/or Virgil Kendall, and/or Peter  
Payne. Under these circumstances, appellant failed to demonstrate the  
probability of a different outcome had counsel raised a defense of  
actual innocence with regard to Richard Davies because he was only

convicted of one count of robbery of a victim over the age of 60 but admitted he had perpetrated this crime against several individuals.

Moreover, a review of the grand jury testimony belies appellant's claim that the grant jury testimony demonstrates his actual innocence. Notably, witness Ruth Speidel testified that she had seen appellant outside the men's restroom where Davies was robbed shortly before the incident. Speidel further testified that she subsequently saw appellant running out of the casino and heard Davies yelling for help. Speidel was able to immediately identify appellant from a photographic lineup. Furthermore, Detective Janie Carr of the Las Vegas Metropolitan Police Department testified that appellant admitted to a robbery in the men's restroom at the Sam's Town Casino in March of 2006. Notably this was when and where Davies was robbed. This testimony falls far short of demonstrating appellant's innocence; therefore, the district court did not err in denying appellant's claim.

10 (Exhibit 8, at pp. 4-5) (footnotes omitted). The factual findings of the state court are presumed  
11 correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the Nevada  
12 Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly  
13 established federal law, as determined by the United States Supreme Court, or that the ruling was  
14 based on an unreasonable determination of the facts in light of the evidence presented in the state  
15 court proceeding. Federal habeas relief is denied as to Ground 2, sub-part 2 of the petition.

### 3. Ground 2, Sub-Part 3

17 Petitioner argues that counsel was ineffective for failing to challenge a “sentencing  
18 enhancement added by the judge” in violation of *Blakely v. Washington* and *Apprendi v. New Jersey*.  
19 (ECF No. 4, at p. 5). The Nevada Supreme Court ruled on this claim, as follows:

[A]ppellant claimed that his counsel was ineffective for failing to challenge the imposition of the sentence enhancement for a crime involving a victim over 60 years of age when appellant had been deprived of a jury trial. Appellant also claimed that he was improperly denied the right to a jury trial on the sentence enhancement for crime involving a victim over 60 years of age. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. Notably, in the guilty plea agreement, which appellant acknowledged reading, signing and understanding, appellant pleaded guilty to robbery, victim over age 60 years or older. Appellant admitted this fact again at the plea canvass. Thus, appellant made or adopted factual statements sufficient to constitute an admission of guilt. For that reason, the district court was permitted to impose the

1 older victim enhancement and a jury trial was not required on this  
 2 claim and counsel was not ineffective in this regard. Therefore, the  
 district court did not err in denying appellant's claims.

3 (Exhibit 8, at pp. 5-6) (footnotes omitted). The factual findings of the state court are presumed  
 4 correct. 28 U.S.C. § 2254(e)(1).

5 Petitioner's reliance on *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New*  
 6 *Jersey*, 530 U.S. 466 (2000), is misplaced because petitioner pled guilty to the offense and admitted  
 7 all of the facts necessary for the age-of-victim enhancement. "When a defendant pleads guilty, the  
 8 State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the  
 9 relevant facts or consents to judicial factfinding." *Blakely*, 542 U.S. at 310. Further, the *Blakely*  
 10 Court stated that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge  
 11 may impose solely on the basis of the facts reflected in the jury verdict or admitted by the  
 12 defendant." *Id.* at 303. Because petitioner pled guilty to and admitted all necessary facts, there was  
 13 no basis on which counsel could have objected to the enhancement based on the victim's age.  
 14 Counsel's performance was not deficient. Petitioner has failed to meet his burden of proving that the  
 15 Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly  
 16 established federal law, as determined by the United States Supreme Court, or that the ruling was  
 17 based on an unreasonable determination of the facts in light of the evidence presented in the state  
 18 court proceeding. Federal habeas relief is denied as to Ground 2, sub-part 3 of the petition.

19 **IV. Certificate of Appealability**

20 District courts are required to rule on the certificate of appealability in the order disposing of  
 21 a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal and  
 22 request for certificate of appealability to be filed. Rule 11(a). In order to proceed with his appeal,  
 23 petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9<sup>th</sup>  
 24 Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9<sup>th</sup> Cir. 2006); *see also United States v.*  
 25 *Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make "a substantial  
 26 showing of the denial of a constitutional right" to warrant a certificate of appealability. *Id.*; 28 U.S.C.

1       § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must demonstrate  
2       that reasonable jurists would find the district court’s assessment of the constitutional claims  
3       debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold inquiry,  
4       the petitioner has the burden of demonstrating that the issues are debatable among jurists of reason;  
5       that a court could resolve the issues differently; or that the questions are adequate to deserve  
6       encouragement to proceed further. *Id.* In this case, no reasonable jurist would find this Court’s  
7       denial of the petition debatable or wrong. The Court therefore denies petitioner a certificate of  
8       appealability.

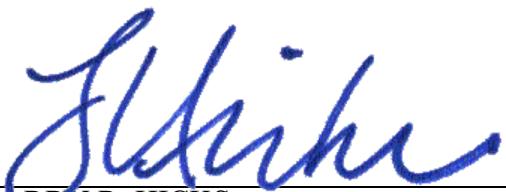
9       **V. Conclusion**

10       **IT IS THEREFORE ORDERED** that the remaining grounds of the petition for a writ of  
11       habeas corpus are **DENIED**.

12       **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**  
13       **APPEALABILITY**.

14       **IT IS FURTHER ORDERED** that the Clerk of Court **SHALL ENTER JUDGMENT**  
15       **ACCORDINGLY**.

16       Dated this 25th day of April, 2014.



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19       LARRY R. HICKS  
20       UNITED STATES DISTRICT JUDGE  
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